From same-sex marriage to equal civil partnerships: on a path towards 'perfecting' equality?

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ABSTRACT

This article will consider the progress made towards achieving equality between same and different-sex couples seeking formalisation of their relationships by examining the extent to which the introduction of civil partnerships and same-sex marriage in England and Wales created equality of access to formal relationship statuses, and the benefits thereby accruing. Elimination of discrimination between same and different-sex couples in this context was not achieved, as accepted by the Court of Appeal in Steinfeld and Keidan*, which concerned a claim for a civil partnership under Articles 8 and 14 ECHR by a different-sex couple. The article will argue that nevertheless furtherance of equality, rather than dignity-based arguments, provided the driving force for change and that the next step taken towards equality requires the creation of symmetry of access to formalisation of relationships as between same and different-sex couples. The Supreme Court in* Steinfeld *now has the opportunity of prompting the taking of that step, but this article further argues that recognition of the value of dignity in this context as linked to non-discrimination should shape the response of the government, either to that decision, or to its own ongoing review of the future of civil partnerships.*

Key words: civil partnerships, marriage, Articles 8 and 14 ECHR, Human Rights Act

INTRODUCTION

This article interrogates the formal recognition and protection of adult intimate relationships in England and Wales[1] in order to examine the progress made towards achieving equality between same and different-sex couples. It therefore considers in Part 1 the extent to which the introduction of civil partnerships and same-sex marriage in England and Wales created equality of access to formal relationship statuses, and to the benefits thereby accruing, as between same and different-sex couples. It considers the rationales for introducing civil partnerships, and then same-sex marriage in England and Wales, focussing on the extent to which furtherance of equality appeared to provide the driving force for change, first as a political aspiration, but after the advent of the Human Rights Act (HRA), as a more legalised concept. It will consider the movement towards equality since then, and some of the anomalies created by the asymmetry of access to formal relationship statuses flowing from the current legal recognition of the marriage and civil partnership statuses in England and Wales. It questions the true acceptance of equality as the value underpinning their introduction, leading to the finding, despite Parliamentary pronouncements to the contrary, that equality was *not* fully achieved, although a significant step towards creating equality has been taken since then, by the Supreme Court in *Walker v Innospec Limited and others*.[2]

It argues in Part 2 that the failure to achieve equality was strikingly the case in respect of the failure to provide equal access to formalised statuses, as accepted by the Court of Appeal in the very significant decision in *Steinfeld and Keidan v Secretary of State for Education,* concerning a claim for a civil partnership by a different-sex couple[3] under Articles 8 and 14 European Convention on Human Rights (ECHR). That decision demonstrated that the value of creating equal access for same or different-sex couples to relationship statuses[4] has still not gained full recognition domestically.[5] Such access arises at present in England and Wales *only* asymmetrically since same-sex couples can access civil partnerships or marriage, while

* The authors would like to thank Chris Barton, Roger Masterman, Gillian Douglas and the anonymous reviewers for their helpful comments on an earlier draft. All opinions and errors remain our own.

[1] See the Marriage (Same Sex Couples) Act 2013. It should be noted that Scotland introduced same-sex marriage in 2014 but Northern Ireland does not currently perform or legally recognise same-sex marriages despite discussion of several reform proposals in the Northern Ireland Assembly.

[2] [2017] UKSC 47, [2017] 4 All ER 1004.

[3] [2017] EWCA Civ 81, [2017] 3 WLR 1237. See C Draghici, 'Equal marriage, unequal civil partnership: a bizarre case of discrimination in Europe' [2017] 29(4) CFLQ 313.

[4] This article assumes that such equal access applies potentially where a partnership has fallen within the category which democratic states generally deem worthy of formal recognition of the relationship (for example, they may choose to exclude siblings, friends or polygamous relationships): see L Glennon, 'Displacing the 'Conjugal Family' in Legal Policy: A Progressive Move?' [2005] CFLQ 141 and N Barker, 'Sex and Civil Partnership Act: The Future of (Non)Conjugality' [2006] 14 Fem LS 241.

[5] See A Hayward, 'Registered Partnerships in England and Wales' in JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017).

different-sex ones can only access marriage.[6] The article proceeds to argue that the Supreme Court now has the opportunity in *Steinfeld* to prompt the 'perfection' of equality in the sense of creation of equality of access to formal relationship statuses, and therefore could reject the stance that a state can rely on sexual orientation to create differentiation between same and different-sex couples as to providing such access.

Creating such symmetry of access by extending civil partnerships to different-sex couples is significant, partly because the label accorded to a formal relationship status matters.[7] In principle, the 'intrinsic value' of such formalisation[8] is diminished where that status does not express the identity of a couple in terms of the signalling of their relationship to others. The worth of civil partnerships as a particular, more neutral, less gendered, 'blank canvas'[9] conception of the public expression of a relationship, untainted or less tainted by patriarchal or religious associations, should be able to find some purchase in a debate that has understandably been dominated by the demand for same-sex marriage. Self-evidently, however, whether an institution is termed marriage or civil partnership cannot by itself change the content of the relationship. Equal access to civil partnerships cannot be presented as a panacea linked to excising fully the ills flowing from the more value-laden institution of marriage, given structural inequalities in society influencing the nature of interpersonal relationships. But making civil partnerships available to different-sex couples could aid in breaking down the religious/patriarchal force of marriage by giving individuals the option of avoiding it without disproportionate loss.

It is further argued that if state denial of equal access to a formal relationship status on grounds of sexual orientation offends against equality values, it therefore also engages that of dignity[10] which has been found to underlie Article 8 as an aspect of the 'very essence of the

[6] For further consideration of such asymmetry arising across ECHR Member States, see H Fenwick and A Hayward, 'Rejecting asymmetry of access to formal relationship statuses for same and different-sex couples at Strasbourg and domestically' [2017] 6 EHRLR 544.
[7] *Steinfeld and Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [45] (Arden LJ). See also *Mikulić v Croatia* [2002] ECHR 27 at [53]: '[private life under Article 8] can sometimes embrace aspects of an individual's social identity', and *Pretty v United Kingdom* (2002) 35 EHRR 1 at [61].
[8] The Court has found that formal civil unions have an 'intrinsic value' for persons regardless of the legal effects they produce: *Vallianatos v Greece* (2014) 59 EHRR 12 at [81], *Oliari and others v Italy* (2017) 65 EHRR 26 at [174].
[9] See *R v Bala and others* [2016] EWCA Crim 560, [2016] 3 WLR 1379 where Davis LJ, at [38], referred to civil partnerships as a 'construct of statute'.
[10] See N Bamforth, 'Same-sex partnerships: some comparative constitutional lessons' [2007] 1 EHRLR 47, 54; Bamforth argues, in the context of defending formalisation of same-sex unions, that there is a 'dependence of equality on deeper values'.

Convention',[11] and to form the 'foundation of all the freedoms' protected by international human rights law.[12] The suggestion that the notion of dignity provides a key to the understanding of discrimination finds support from a range of writers.[13] It is argued that state denial of a choice as to a particular formalisation of a relationship need not be seen as in itself an assault on a couple's dignity, but that such an assault could be said to arise due to denial of an *equal* choice as to formal partnership status on grounds of sexual orientation.[14] The value of equal treatment in this context may be viewed as linked to furtherance of the value of dignity and freedom of choice, understood – as articulated in *Goodwin v UK*[15] in relation to Article 8 – as 'the right to establish details of [one's] identity as individual human beings' and in *Obergefell* as a formal recognition of the dignity of the bond of a couple.[16] If a couple *on grounds of sexual orientation* has open to them only one formal relationship status inimical to them, and therefore unavailable to them as an effective option, then the values of dignity and freedom of choice essential to the notion of identity, are undermined. The unique situation that has arisen in England, Wales and Scotland whereby the civil partnership status was maintained *after* the introduction of same-sex marriage has enabled the creation of a 'civil-partner' identity. Thus equality of state recognition of relationships via the introduction of same-sex marriage, although an important aspect of dignity,[17] is not exhaustive of it. For individuals who have chosen to identify as 'civil partners' this decision carries an *intrinsic* dignity that is distinct from the dignity of such recognition.

[11] See *Pretty v UK* (2002) 35 EHRR 1 at [65].
[12] By Lord Dyson in *RT (Zimbabwe) v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)* [2012] UKSC 38, relying on the references to dignity in the Universal Declaration on Human Rights at [29]-[30], [39]. See further D Feldman, 'Human Dignity as a Legal Value: Part I' [1999] *Public Law* 682, 688.
[13] See C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *The European Journal of International Law* 655, 681, 683, 684, 686; T Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) p6; J Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in C McCrudden (ed.), *Understanding Human Dignity - Proceedings of the British Academy* (2013) pp. 393-402; N Bamforth, 'Same-sex partnerships: some comparative constitutional lessons' [2007] 1 EHRLR 47, 53-56.
[14] See, in a different context, Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [131]-[132].
[15] *Christine Goodwin v UK* (2002) 35 EHRR 18 at [90].
[16] See *Obergefell v Hodges* 576 US (2015) June 26 at [28]: 'There is dignity in the bond between two men or two women who seek to marry…'. So exclusion of same-sex couples from marriage was found to amount to an assault on their dignity. See also the observations of Sachs J in *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19 noting, at [71], that such exclusion 'reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone'.
[17] N Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183, 257-58.

That final point is addressed in Part 3 which seeks to demonstrate that equality-based arguments alone are inherently limited as compared to dignity-based ones, given that in order to address the discrimination against different-sex couples to be argued for in the Supreme Court in *Steinfeld* the option of mere abolition of civil partnerships could be taken by the government in response to that decision or to its own ongoing review. So doing would obviously deprive different-sex couples of that option, but, more significantly, it would also have a highly detrimental impact on same-sex couples *currently* in civil partnerships. It could, further, affect *all* same-sex couples ideologically opposed to marriage *more* detrimentally than it would affect different-sex couples who are so opposed. One of the purposes of this article, then, is to explore that so far unexplored dimension of the debate surrounding *Steinfeld* - the detrimental impact of abolition of civil partnerships on same-sex couples, bearing the history of the struggle for acceptance of formalisation of same-sex relationships in mind, and the particular meaning of that status for same-sex couples. If that option was taken, the movement towards 'perfecting' equality between same and different-sex couples in terms of providing equal access to formal relationship statuses which this article traces, would in one sense have achieved success. Symmetry of access to such statuses would be created: same and different-sex couples would each be able to access one formalised status only. But such a finding, it will be argued, would disregard both the possible indirectly discriminatory impact on same-sex couples currently in civil partnerships and the concomitant assault on their dignity as recognised under Article 8 ECHR that could be deemed to arise if their relationship status was abolished.

1. THE EQUALITY RATIONALE UNDERLYING FORMAL RECOGNITION OF SAME-SEX RELATIONSHIPS

In England and Wales the dominant focal point in the historical development of family law and, indeed, the very definition of what constitutes a family, has been marriage.[18] Its historical association with the creation of gender inequality has been canvassed frequently:[19] over the centuries, marriage enjoyed a systematic prioritisation in law due to its association with propriety and with patriarchal values arising from its Christian heritage,[20] along with the

[18] See S Poulter, 'The Definition of Marriage in English Law' (1979) 42 *Modern Law Review* 409.
[19] See R Auchmuty, 'What's So Special about Marriage? The Impact of *Wilkinson v Kitzinger*' [2008] CFLQ 475 and R Harding, 'Sir Mark Potter and the Protection of the Traditional Family: Why Same Sex Marriage is (Still) a Feminist Issue' (2007) 15 Fem LS 223.
[20] See Ephesians 5:23: 'For a *husband* is the *head* of his *wife as Christ* is the *head* of the *church'*.

perceived stability it offered for the procreation and rearing of children, and the legal certainty it produced through insistence on compliance with formalities for its creation.[21] More recently, marriage, and in particular its privileged status, has been subject to critical scrutiny,[22] and, as noted recently by the Court of Appeal in *Owens v Owens*, the institution has incrementally evolved to reflect the marital state as an equal partnership, thereby distancing itself, formally speaking, from its paternalistic and patriarchal origins.[23] The widespread dismantling of the legal consequences of coverture (in particular, the doctrine of unity that subsumed the wife's legal identity and existence within that of the husband),[24] the introduction of no-fault divorce,[25] the shift from rights to responsibilities in relation to the upbringing of children,[26] the recognition of domestic contributions within the division of assets upon divorce[27] and, more recently, the introduction of same-sex marriage, have all contributed to the development of this more egalitarian vision of marriage. As a consequence, Lord Penzance's Christianity-based and long-celebrated 'definition' of marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others' now requires considerable revision.[28] Nevertheless, as mentioned above, it cannot be assumed from the viewpoint of a number of feminists that the historical association between marriage and patriarchy has been entirely undermined; from that viewpoint as an institution it is fundamentally tainted, and however much it has developed it cannot fully purge itself of that association.[29] Despite changes in the nature of marriage (both legal and social) since the first- and second-wave feminist critiques, it still, to a significant number of couples,[30] brings with it

[21] This was particularly the case after Lord Hardwicke's Marriage Act 1753; see R Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge University Press, 2009).
[22] See, for example, E Clive, 'Marriage: an unnecessary legal concept?' in J Eekelaar and S Katz, *Marriage and Cohabitation in Contemporary Societies* (Butterworths, 1980) and MA Fineman, 'Why Marriage?' (2001) 9 Va J Soc. Policy Law 239.
[23] [2017] EWCA Civ 182, [2017] 4 WLR 74 at [89] (Sir James Munby).
[24] See A Hayward, 'The Married Women's Property Act 1882' in E Rackley and R Auchmuty, *Women's Legal Landmarks: Celebrating 100 Years of Women and Law in the UK and Ireland* (Hart, 2018).
[25] See Divorce Reform Act 1969, as consolidated in the Matrimonial Causes Act 1973 ss 1(2)(d)-(e).
[26] See Children Act 1989, especially the welfare principle and the concept of parental responsibility.
[27] See Matrimonial Causes Act 1973, Pt II and for 'big money' cases, see *White v White* [2001] 1 AC 596, [2001] 1 AC 596 and the creation of the 'yardstick of equality'.
[28] *Hyde v Hyde* (1866) LR 1 P&D 130, 130. See R Probert, '*Hyde v Hyde*: Defining or Defending Marriage?' [2007] CFLQ 322.
[29] See N Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan, 2012) and C Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford University Press, 2017) especially pp13-27.
[30] On the popularity of different-sex civil partnerships in the Netherlands, see Central Bureau Statistics, https://www.cbs.nl/nl-nl/nieuws/2016/23/minder-huwelijken-meer-partnerschappen (in Dutch). For a similar view in France, see L Francoz Terminal, 'From same-sex couples to same-sex families? Current French legal issues' [2009] 21(4) CFLQ 485 and L Francoz Terminal, 'Registered Partnership in France' in JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017).

patriarchal and heteronormative associations,[31] although it is not suggested that heterosexuals seeking civil partnerships would always choose them on that basis.[32] Similarly, while some academics accept that the availability of same-sex marriage has dismantled the patriarchal structures of marriage,[33] others envisage continued resistance to that institution,[34] especially as the promotion of marriage may marginalise the legal recognition of other relationships of care and dependency.[35]

Thus some heterosexual women seeking formalisation of their relationship would reject the label 'wife', both as non-reflective of their conception of their role in their relationship with their partner, and as an inaccurate signalling of the nature of their relationship to others. It clearly goes beyond what could be offered by a civil partnership as opposed to marriage to expect that gendered roles would *necessarily* be discarded merely by entering that status rather than that of civil marriage. As Katharine O'Donovan pointed out in one of the very earliest feminist legal analyses of marriage, individuals may be slotted into state-ordained roles, however hard they seek to avoid them in the ways they lead their lives.[36] For example, the unavailability of affordable childcare might mean that the woman, whether in a civil partnership or a marriage, had to stay at home to care for children or elders, forcing her into economic dependence on her partner. However, the rejection of the role of 'wife' by the woman who had the choice of entering a civil partnership could aid in signalling to those around her, including her partner, that from the outset of their formalised relationship, the expectations of economic inequality between husband and wife associated with wifehood would not apply. So a lack of affordable childcare would not necessarily give rise to the expectation that *she* would be the partner forced into economic dependency. Moreover,

[31] For a contrary view, see MA Case, 'What feminists have to lose in same-sex marriage litigation' (2010) 57 *UCLA Law Review* 1199. She argues that the entry of same-sex couples into marriage has completed a longstanding process of dismantling the patriarchal structure of marriage. But see S Jeffreys, 'The Need to Abolish Marriage' (2004) 14(2) *Feminism & Psychology* 327, R Auchmuty, 'Same-Sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14(1) *Feminism & Psychology* 101 and N Barker, *Not the Marrying Kind: A Feminist Critique of Same-Sex Marriage* (Palgrave Macmillan, 2012).

[32] See A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' [2010] CFLQ 328 where the authors, at 336, identify one group of cohabitants as 'ideologues', meaning that one or both partners object to contracting a marriage. Different-sex partners also within that group would therefore be most likely to favour a civil partnership, if they were able to enter one.

[33] See MA Case, 'What feminists have to lose in same-sex marriage litigation' (2010) 57 *UCLA Law Review* 1199.

[34] C Young and S Boyd, 'Losing the Feminist Voice? Debates on the Legal Recognition of Same Sex Partnerships in Canada' (2006) 14(2) Fem LS 213.

[35] J Butler, 'Is Kinship Always Already Heterosexual?' (2002) 8 *Differences: A Journal of Feminist Cultural Studies* 369.

[36] K O'Donovan, 'The male appendage: Legal definitions of women' in S Burman (ed) *Fit Work for Women* (Croom Helm, 1979) p135-6.

rejection of the role of wife, not only by cohabitants but by heterosexual female civil partners, could have an impact on society's endorsement or acceptance of gendered economic inequality within marriage. If some such impact were *not* anticipated, the opposition to different-sex civil partnerships coming from conservative religious groups in Europe[37] might be more puzzling, bearing in mind their allegiance to male 'headship' which is inevitably associated with economic inequality between husbands and wives.

(a) The Civil Partnership model: separate but equal?

The introduction of civil partnerships in 2005 under the Civil Partnership Act 2004 was a game-changing moment for domestic family law. By creating another formalised status to exist alongside marriage, England and Wales, in company with a number of other European countries,[38] demonstrated that marriage was not the only legal status through which couples could publicly express an intimate relationship and obtain civic benefits. The earliest iterations of the civil partnership model in England and Wales were initially motivated by a commitment to addressing discrimination against couples on grounds of sexual orientation, but also, somewhat ironically (in light of the outcome), by a desire to offer different-sex couples a choice as to formalisation of their relationships.[39]

The principle of equality featured prominently in the Parliamentary debates on an earlier Civil Partnerships Bill introduced by Lord Lester of Herne Hill. Supporting the Bill, Lord Dholakia remarked that '[e]quality is at the heart of our democratic process',[40] while Lord Rennard rejected the assertion that the core principles of the Bill were complex, asserting instead that '[t]he principle is simple: this is an issue of human rights and equality before the law'.[41] Clearly, however, Parliamentary insistence on creating equality between same and different-sex couples did not extend at the time to creating full symmetry of access to formal

[37] On the opposition of the Austrian Catholic Church, see Deutsche Welle, 'Austrian Straight Couple Applies for Gay Marriage', 16 February 2010. See also A McSmith and S Morrision, 'Archbishop of Canterbury, Justin Welby, abandons his support for civil partnerships for heterosexual couples', *The Independent*, 18 May 2013.
[38] See L Nielson, 'Family Rights and the "Registered Partnership" in Denmark' (1990) 4 (3) IJLF 297 and I Lund-Andersen, 'The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?' in R Wintemute and M Andenaes, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing, 2001). For a more recent comparative analysis, see JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017).
[39] On precursors to the Civil Partnership Act 2004 see the House of Commons Research Paper, *The Relationships (Civil Registration) Bill and the Civil Partnerships Bill (Bill 36 of 2001-02 and HL Bill 41 of 2001-02)* (London, 2002).
[40] *Hansard, Lords Debates*, vol 630, col 1719 (25 January 2002).
[41] Ibid, col 1726.

relationship statuses, given that same-sex marriage was not proposed alongside civil partnerships. That lacuna in the debate was then in effect replicated in the Marriage (Same Sex Couples) Act 2013, in the sense that it led to asymmetry of such access, this time largely to the disadvantage of different-sex couples, as discussed further below.

In the run-up to the introduction of the 2004 Act, the equality rationale continued to dominate the discourse surrounding civil partnerships. The value of allowing symmetry of access to formalisations of relationships to different-sex couples, however, no longer featured in the debates, on the basis that the key objective was to address discrimination against couples on the basis of their sexual orientation.[42] The decision was taken to exclude different-sex couples from the proposals, since, according to the Consultation, they were in a significantly different position 'from that of same sex couples who wish to formalise their relationships but currently are unable to do so'.[43]

Despite some legal protections existing at that time for same-sex couples,[44] civil partnerships were viewed as 'an important equality measure' that would contribute to a process of cultural change in relation to attitudes towards same-sex relationships.[45] In the Parliamentary debates on the Civil Partnership Bill the furtherance of equality between same and different-sex couples was widely cited as the key motivation behind the reform alongside conscious acknowledgment of human rights obligations.[46] Lord Beaumont, adopting the common stance of downplaying the financial elements of the proposal, stated that the Bill was 'not about economics…it [was] about human rights and justice'.[47] As a result, the arguably imprecise references to general equality and social justice in the earlier Parliamentary debates began to be anchored to direct references to Article 14 ECHR and the recently introduced Human Rights Act. Lord Lester, for example, found:

[42] Although note that the Civil Partnership Act 2004 is not structured around an individual's sexual orientation but rather around his/her gender.
[43] Department for Trade and Industry, *Civil Partnership: A Legal Framework for the Legal Recognition of Same Sex Couples* (London, 2003) p 13.
[44] See the domestic violence protections in Part IV of the Family Law Act 1996, protections in relation to tenancy succession (*Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27, [1999] 3 WLR 1113, and *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557) and the Adoption and Children Act 2002.
[45] Department for Trade and Industry, *Civil Partnership: A Legal Framework for the Legal Recognition of Same Sex Couples* (London, 2003) p 13.
[46] Equality was cited as a key motivation by Baroness Gould (*Hansard, Lords Debates,* vol 660, col 402 (22 April 2004)) and Lord Haskell (*Hansard, Lords Debates*, vol 660, col 418 (22 April 2004)).
[47] *Hansard, Lords Debates*, vol 662, col 1406-28 (24 June 2004).

> '…the Bill seeks to give effect to a basic human right…a right to equal treatment without discrimination in one's private life…a fundamental human right guaranteed by the ECHR [and HRA]'.[48]

This engagement with the ECHR, and the deployment of equality-based arguments to justify the introduction of civil partnerships, intensified following the introduction of same-sex marriage, and currently features prominently in the campaign for different-sex civil partnerships.

Thus, after the introduction of civil partnerships, in terms of the conferral of civic benefits, equality was largely attained since civil marriage provided the foundational model. But in terms of the formalisation ceremony, the terminology used, and the treatment of the sexual relationship between the partners, a contradictory emphasis on creating differentiation between civil partnerships and civil marriage emerged.[49] Civil marriage, therefore, was not fully deployed as the model in terms of its 'recognition' elements: civil partnerships were accorded a distinct status under the Act, which created a bespoke structure for their recognition, reliant on a terminology differing from that used by civil marriage.[50] Also, unlike civil marriage, which uses specific vows, and inherits much of the legacy of religious marriage in terms of its ceremonial aspect, civil partnerships are contracted through the simple act of registration; potentially they can be conducted in silence.[51] Furthermore, aspects of the legal response pertaining to the sexual relationship between spouses were not carried over into civil partnerships, as revealed in the inability of civil partners to apply for dissolution of their partnerships in the light of their partners' adultery, or to seek a decree of nullity on the basis of the inability of either party to consummate the partnership, or on the basis of the respondent's wilful refusal.[52] In this sense, the sexual element was excised from civil partnerships, thereby creating differentiation between the institutions of partnerships and

[48] *Hansard, Lords Debates*, vol 663, col 391-418 (1 July 2004).
[49] On the exchange of customs, ceremonies and rituals between marriage and civil partnerships see E Peel, 'Civil Partnership Ceremonies: (Hetero)normativity, Ritual and Gender' in J Miles, P Mody and R Probert, *Marriage Rites and Rights*, (Hart Publishing, 2015) 99.
[50] For example, civil partners dissolve their civil partnerships as opposed to divorcing.
[51] See S Cretney, *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'* (Oxford University Press, 2005) p 23. Note, however, that the distinction may break down in practice since, provided the default elements are met, couples may customise their ceremonies.
[52] However, it should be noted that a civil partner's infidelity would fall within 'unreasonable behaviour' under s. 44(5)(a) Civil Partnership Act 2004. See S Cretney, 'Sex is Important' [2004] Fam Law 777, L Crompton, 'Where's the Sex in Same-Sex Marriage' [2013] 43 Fam Law 564 and J Herring, 'Why Marriage Needs to be Less Sexy' in J Miles, P Mody and R Probert, *Marriage Rites and Rights* (Hart Publishing, 2015).

of marriage, reflecting the sustained and lengthy celebration of the marital status as a sexual and procreative union.[53] In this sense, differentiation was also created between the protective and the expressive aspects of the civil partnership status.

(b) Introducing same-sex marriage: equality achieved?

The ban on same-sex marriage came under increasing pressure and once again the equality rationale rather than dignity-based arguments provided the driving force for change: a governmental view emerged to the effect that the ghettoization of formal relationships by sexual orientation, reserving civil partnership to same-sex couples, and marriage to different-sex ones, was perpetuating 'misconceptions and discrimination'.[54] Similarly, the principle of equality also featured prominently in the Parliamentary debates on the Marriage (Same Sex Couples) Bill 2013. In particular, speaking for the Coalition government, Maria Miller, then Minister for Women and Equalities, asserted that 'Parliament should value people equally in the law, and enabling same-sex couples to marry removes the current differentiation and distinction'.[55] There was widespread support from the Opposition; Labour's Yvette Cooper MP viewed same-sex marriage as 'the next step for equality'[56] and called for Parliament to stand up against 'discrimination and…for the interests of equality'.[57]

However, despite the use of equality rhetoric in Parliament, equality was not fully achieved between same and different-sex couples who marry. Whilst the Marriage (Same Sex Couples) Act 2013 begins in section 1(1) with the short, simple and permissive provision that the '[m]arriage of same sex couples is lawful', the ensuing provisions largely undercut that sentiment and detail extensive exceptions to the rule. These restrictions, constituting Maria Miller's so-called Quadruple Lock, were to ensure protection for religious organisations that did not wish to officiate for same-sex ceremonies, meaning that while equal civil marriage exists in England and Wales, a religious same-sex wedding can only take place provided that the religious organisation consents and opts into the statutory scheme. Furthermore, whilst the civic benefits afforded as between same and different-sex married couples, and between civil partners and married couples, were rendered largely comparable, there was, as

[53] See the observations in *Wilkinson v Kitzinger (No 2)* [2006] EWHC 2022 (Fam), [2007] 1 FLR 295 at [118] (Potter P).
[54] Government Equalities Office *Equal Civil Marriage: A Consultation,* (London, 2012) p 1.
[55] *Hansard*, HC Deb, vol 558, col 125 (5 February 2013).
[56] Ibid, col 136.
[57] Ibid, col 137.

mentioned above, a significant point of divergence relating to occupational pension schemes.[58] Whereas a heterosexual spouse had access to a survivor's pension entitlement dating back to the point at which contributions started, a civil partner (and subsequently a same-sex spouse) could not access benefits accrued by their partner before 5 December 2005, the date on which the Civil Partnership Act 2004 came into force.[59] This inequality was subsequently removed by a unanimous Supreme Court in *Walker v Innospec Ltd and others,* after Walker challenged Innospec's refusal in 2006 to agree to his pension being paid to his then civil partner (and now spouse).[60] Lord Kerr accepted that European Union Law did not compel Member States to recognise same-sex civil partnerships or marriage, but, given their presence in the UK, and in order to avoid provision of illusory protection for couples, he found that 'formal equality for same sex couples will always be deficient if they are unable to avail themselves of the legal benefits attendant on marriage.'[61] The Court accordingly made a declaration that the relevant provision in the Equality Act 2010 was incompatible with European Union law and must be disapplied, thereby generating a pension entitlement for Walker's husband. By disapplying this provision, another distinction in the legal treatment of same and different-sex couples was removed in a significant step towards ensuring full equality.

But clearly a further very significant inequality remains – the main subject of this article: in considering the bases for the formal recognition of partnerships, it was decided that civil partnerships should be retained, since it was found that many of the respondents to the Equal Civil Marriage Consultation valued them.[62] But the Government did not support extension of civil partnerships to different-sex couples on the basis that a need for their introduction could not be identified from the Consultation.[63] Once again therefore the attempt to capture equal respect for relationship forms in legislation failed to achieve full equality since equal access to relationship formalisations for same and different-sex couples was denied. This failure was highlighted in the Parliamentary debates, particularly following a proposed amendment to the Marriage (Same Sex Couples) Bill that would have extended civil partnerships to different-

[58] See the House of Commons Briefing Paper, *Pensions: civil partnerships and same sex marriages* (London, 2015).
[59] See Equality Act 2010, Sch 9, para 18 as subsequently amended by Marriage (Same Sex Couples) Act 2013, Schedule 4(6), para 17(2).
[60] [2017] UKSC 47, [2017] 4 All ER 1004.
[61] Ibid, at [18].
[62] HM Government, *Equal Marriage: The Government's Response* (London, 2012) p 11.
[63] Ibid.

sex couples.[64] Arguing in support of the amendment, Caroline Lucas MP considered that the extension would 'promote equality' and would 'allow everyone – same-sex and opposite-sex couples - to enjoy a civil partnership or marriage'.[65] Although ultimately defeated, the amendment would have more fully embraced the equality rationale, not only as a motivating force behind the introduction of same-sex marriage, but also since symmetry of access to formal relationship statuses would have been achieved. This defeat arguably arose as a result of the attempt by the government on the one hand to placate Stonewall, an LGBT organisation in favour of retaining civil partnerships owing to their 'special and unique status',[66] but on the other the Church of England, which took the stance that extension of civil partnerships to different-sex couples would undermine marriage.[67]

(c) Asymmetry of access to formal relationship statuses creating discrimination against different-sex couples

The decision to retain civil partnerships alongside same-sex marriage produced the current anomalous situation of discriminating against different-sex couples since on the basis of sexual orientation (although formally on the basis of gender) such couples cannot access a particular formal relationship status which is open to same-sex couples. Following a public consultation, the Department for Culture, Media and Sport released a Report in 2014[68] which found that a majority of respondents were in favour of retaining civil partnerships for same-sex couples[69] but were against their extension to different-sex couples.[70] The arguments proffered against extension centred on the risk that different-sex civil partnerships would undermine the institution of marriage and that those seeking them due to the religious nature of marriage could readily enter into a fully secular civil marriage. Conversely, those in favour

[64] The proposed amendment, Clause 10, introduced on 20 May 2013 and tabled by Tim Loughton MP.
[65] *Hansard*, HC Deb, vol 563, col 1001 (20 May 2013).
[66] Stonewall, *Official Statement*, 2010. See also J Geen, 'Stonewall says it will campaign for gay marriage' *PinkNews* 27 October 2010.
[67] See R Wintemute, 'Civil partnership and discrimination in *R (Steinfeld) v Secretary of State for Education*' [2016] CFLQ 365, 367.
[68] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London, 2014).
[69] Ibid, para 2.3 noting 55% of respondent in favour, 30% against, with 16% holding no view.
[70] When asked whether civil partnerships should be extended to different-sex couples, 76% of respondents were against with 22% in favour: Department for Culture, Media and Sport, ibid, para 2.12. Note that the remaining 2% of respondents held no view.

argued the case almost entirely from a non-discrimination perspective,[71] illustrating the extent to which the pursuit of equality had influenced the discourse surrounding civil partnership reform.

In light of the Report's conclusion that no changes were to be made, it is perhaps unsurprising that further impetus for reform arose in the wake of the 2013 Act. The perception that equality values had been violated by the creation of asymmetry of access to formal relationship statuses for couples based on sexual orientation was the driving force behind Tim Loughton's Private Member's Bill put forward originally in 2015, and in a modified form in 2017, intended to effect extension of civil partnerships to different-sex couples.[72] When advocating the changes in his Bill, Tim Loughton MP stated that same-sex marriage had:

> '…created a new inequality, and a Government who argued zealously that same-sex marriage was an equality issue seem to have rather lost interest when it comes to an equality that affects opposite-sex couples'.[73]

The latest iteration of the Bill passed its Second Reading in February 2018,[74] but rather than proposing, as originally planned, textual amendments to the Civil Partnership Act 2004 in order to extend civil partnerships to different-sex couples, it had been watered down so as merely to compel the Secretary of State to compile a Report assessing the future of civil partnerships. Victoria Atkins MP, the Parliamentary Under-Secretary of State for the Home Department, affirmed in the Second Reading that a Report will be presented to Parliament following a full public consultation that analyses the current uptake of civil partnership and same-sex marriage, conversion statistics, surveys as to the demand for civil partnerships by different-sex couples, and the experience of other jurisdictions when reforming this area of law.[75] The Government envisages that it will have 'a proportionate amount of data' by September 2019.[76]

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[71] See the observation from the Report that '[a]lmost no respondents mentioned benefits other than in terms of advancing equality if civil partnerships were opened up to opposite sex couples': Department for Culture, Media and Sport, ibid, para 2.30.
[72] See the Civil Partnership Act 2004 (Amendment) Bill 2016-2017.
[73] *Hansard*, HC Deb, vol 619, col 639 (13 January 2017).
[74] See the Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill 2017-19.
[75] *Hansard*, HC Deb, vol 635, col 1121 (2 February 2018).
[76] Ibid, col 1122.

Extension of civil partnerships to different-sex couples was also the subject over the same period of time of the court action in *Steinfeld*, as discussed below, relying on Articles 8 and 14 ECHR, and on developments in formal recognition of relationships at Strasbourg. That is the matter to which this article now turns, on the basis that the *Steinfeld* litigation may eventually prove more likely than legislative action to create a driver for change. While it was never very likely that the Loughton Bill would lead *directly* to the introduction of different-sex civil partnerships, the change it has undergone in its most recent iteration may have rendered that prospect even more remote, unless further impetus to do so arises from *Steinfeld.*

2. JUXTAPOSING THE STRASBOURG ARTICLE 8 AND 14 JURISPRUDENCE WITH SAME-SEX RELATIONSHIP LEGISLATION IN ENGLAND AND WALES: *STEINFELD AND KEIDAN*

As discussed, the advent of the HRA, drawing Articles 8 and 14 ECHR into domestic law, encouraged equality-based arguments to influence the re-shaping of state recognition of relationships. The current domestic conception of formal recognition of partnerships as captured legislatively has shown a greater and more flexible capacity to absorb such arguments, reflected under Articles 8 and 14 ECHR, than has the Strasbourg Court[77] due to its structural position as an international court. It might appear then that such arguments would be likely to have little potential impact on the current domestic conception of formal recognition of partnerships. The discussion below, however, finds that arguments arising those Articles could still have a more dynamic impact in the domestic courts in triggering development of that recognition, given that the restraining margin of appreciation doctrine has no application in domestic law. The domestic semi-equivalent of that doctrine, according a 'discretionary area of judgment', may tend to exert a lesser restraining impact, since, unlike the Strasbourg Court, the UK Supreme Court need not concern itself with the reception of its judgments in states with a record of weaker adherence to the ECHR. Thus it has less need to exercise self-restraint. This point is pursued below.

[77] Andrews J noted this explicitly at first instance in *Steinfeld & Keidan v Secretary of State for Education* [2016] EWHC 128, [2016] 4 WLR 41 at [53]. This may be said given that the Strasbourg Court has not found a right to same-sex marriage under Article 12, either read with 14 or alone: see *Oliari and others v Italy* (2015) 65 EHRR 957.

Reference to equality-based arguments under the ECHR became the driving force behind the *Steinfeld* litigation. The anomalous situation outlined above that has arisen in England and Wales [78] whereby, while same-sex couples can access marriage or a civil partnership, heterosexual ones can only access marriage, gave rise to the challenge in *Steinfeld* by the two claimants, a couple in a committed long-term heterosexual relationship, with two children. They are challenging their exclusion from the civil partnership status since they are seeking to formalise their relationship, but do not want to marry due their strong ideological objections to the institution of marriage, as imbued with historical patriarchal trappings. They view civil partnership as a status that reflects their values and recognises the equality of their relationship. Moreover, they point to the fact that a significant number of people share their view that marriage remains tainted by religious and patriarchal associations.[79] In pursuit of their claim they are relying on Articles 8 and 14 ECHR under the HRA, and arguing that they are being discriminated against on grounds of their sexual orientation since a same-sex couple could contract marriage under the Marriage (Same Sex Couples) Act 2013, but could also enter a civil partnership instead.

(a) The 'ambit' argument under the 'respect for family life' aspect of Article 8(1)

In order to invoke Article 14 it must be shown that the claim in question falls within the ambit of a substantive Convention Article, in this instance Article 8. It is not necessary for the other right to be breached, and in general the enquiry is only as to the scope of that other right, not as to the nature of the interference that has occurred in terms of detriment to the applicant.[80] In the High Court Andrews J found, relying on domestic case-law, that to come within the ambit of Article 8(1) the claimant 'must establish that a *personal interest close to the core*' of the right in question…is infringed by the difference in treatment complained of'.[81] She relied on the House of Lords' decision in *M v Secretary of State for Work and*

[78] Scotland is in a similar position. See the *Review of Civil Partnership: Scottish Government Response to Consultation*, 21 November 2017, stating that no action will be taken until further research is undertaken on the impact of same-sex marriage and the demand for different-sex civil partnerships.
[79] The campaign is backed by a Change.org petition, *Open Civil Partnerships to All*, which as of March 2018 has just over 125,000 signatures. See also Equal Civil Partnerships, 'Why Does it Matter?' available at http://equalcivilpartnerships.org.uk/why-does-it-matter/ .
[80] See *Petrovic v Austria* (2001) 33 EHRR 14. See also JM Scherpe, 'Family and Private Life, Ambits and Pieces – *M v Secretary of State for Work and Pensions*' [2007] 19(3) CFLQ 32 and C Fenton-Glynn, 'Opposite Sex Civil Partnerships and the Ambit of Article 8' (2016) 46 Fam Law (Last Orders).
[81] *Steinfeld & Keidan v Secretary of State for Education* [2016] EWHC 128, [2016] 4 WLR 41 at [25], emphasis added.

Pensions,[82] in which the impact of a statutory scheme relating to child support contributions was linked to the applicant's status as part of a same-sex relationship, but the House of Lords found that its impact was not connected closely enough to the core values of Article 8(1). Therefore if Article 8(1) was not engaged, Article 14 could not be either. Relying on *M* Andrews J found that in denying Steinfeld and Keidan the right to enter into a civil partnership 'the state has done nothing to interfere with their love, trust, confidence, or mutual dependence and has placed no constraints on their social intercourse'.[83] So she viewed the ability to enter a civil partnership as peripheral under Article 8(1).

Taking account of *Wilkinson v Kitzinger and another*[84] in which a same-sex couple lawfully married in Canada unsuccessfully contended that the statutory provisions of the Matrimonial Causes Act 1973 and of the 2004 Act precluding recognition of their union as a marriage, but treating it instead as a civil partnership, infringed Article 14 read together with Article 8, Andrew J further noted that Steinfeld and Keidan had not been denied any possibility of attaining formal state recognition of their relationship[85] since they could achieve such recognition via civil marriage. She found that the relevant Strasbourg jurisprudence[86] supported the proposition that detriment due to the lack of formal state recognition of relationships was needed, given that the applicants in question under that jurisprudence had also had no *other* means available to them of formalising their relationships.

The Court of Appeal, however, found unanimously that the barrier to access of different-sex couples to civil partnerships did fall within the ambit of Article 8(1).[87] As Arden LJ pointed out, the position at Strasbourg as to its ambit appears to differ strongly from that put forward in *M*. She noted that in *Oliari and others v Italy*[88] the Strasbourg Court had 'specifically rejected the argument that…the applicants had to show that they suffered any loss as a result of not being able to enter a civil union'.[89] In *Oliari* the Court had not found it necessary to point to any specific detriment caused to the applicants' closeness or inter-dependency due to

[82] [2006] UKHL 11, [2006] 2 WLR 637.
[83] *Steinfeld & Keidan v Secretary of State for Education* [2016] EWHC 128, [2016] 4 WLR 41 at [37].
[84] [2006] EWHC 2022 (Fam), [2006] 2 FLR 397.
[85] *Steinfeld & Keidan v Secretary of State for Education* [2016] EWHC 128, [2016] 4 WLR 41 at [36].
[86] See *Schalk and Kopf v Austria* (2011) 53 EHRR 20 and *Vallianatos v Greece* (2014) 59 EHRR 12.
[87] *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [25]-[46].
[88] (2015) 65 EHRR 957.
[89] *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [29] referring to *Oliari* at [70]-[71].

their exclusion from a formal framework protective of their relationships in order to bring them within the ambit of Article 8(1).[90] Thus the Court of Appeal definitively rejected the idea that a detrimental impact on the applicants of the non-availability of a means of formalising the relationship was necessary to bring the situation within the ambit of Article 8. Clearly, the applicants in *Oliari* had suffered detriment – but that was not part of the *ambit* argument.

Arden LJ also rejected the argument that the applicants could marry on the basis that the detrimental impact on the applicants of the non-availability of a means of formalising their relationship was not the basis for the decisions cited to the Court in *Schalk and Kopf v Austria,*[91] *Vallianatos v Greece*[92] and *Oliari* as to *ambit.* In *Vallianatos* the applicants as a same-sex couple had argued that the Greek government had breached Article 8 read with 14 due to their exclusion from accessing a formal relationship status in the form of a registered partnership, although such partnerships were available to different-sex couples (who could also access marriage). The government argued that the applicants could achieve rights via a cohabitation agreement, but that argument was rejected on the basis that the applicants would not then achieve legal recognition of their relationship – in itself of intrinsic value. Arden LJ considered that the Strasbourg Court would equally reject the 'can marry' submission as well,[93] making the key point that marriage would not be 'an effective option' for the couple in question, given their settled beliefs.

The Court of Appeal had to address the question of following *M* on the issue of ambit. Arden LJ found that the need for a 'personal interest close to the core values of a Convention right' from *M* to engage Article 8 would be satisfied under the current state of the case-law, as set out in the relevant jurisprudence, including *Oliari*.[94] She went on to consider whether adverse impact was required in the instant case, and found a way of distinguishing *M*. She found that adverse impact was only required in respect of negative obligations of the state under Article 8, not positive ones, relying on the speeches of Lords Walker and Bingham in *M*. Given that *M* could be characterised as a case concerning negative obligations, while *Steinfeld*

[90] *Oliari and others v Italy* (2015) 65 EHRR 957 at [70].
[91] (2011) 53 EHRR 20.
[92] (2014) 59 EHRR 12.
[93] *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [40].
[94] Ibid, at [62].

concerned positive ones,[95] she considered that *M* did not determine that adverse impact was required in the instant case.

That argument is open to doubt since it relied on creating a novel distinction under Article 8 jurisprudence between negative and positive obligations. Clearly, when the state breaches negative obligations, it is likely that detriment would accrue to the victim in any event, but a bright-line distinction between negative and positive obligations in terms of the need to show detriment in respect of the ambit of the former but not the latter is not apparent from the case-law.[96] An alternative would have been to argue on the facts that *M* was non-analogous to *Steinfeld* since *M* concerned a far less intimate area of family life – the payment of specific sums of money in child support - than the public expression of a relationship, as in *Steinfeld.* However, on the basis of the distinction identified the Court of Appeal was then able to find that the interpretation of Article 8(1) at Strasbourg in respect of positive obligations has changed in relation to the nature of the ambit at issue in *Steinfeld* since *M* was decided.

As Arden LJ impliedly accepted, Andrews J and the judges in *M* and in *Wilkinson* mistakenly conflated the question of determining the ambit of the 'family life' aspect of Article 8(1) with making a determination as to the demands of necessity and proportionality under Article 8(2), or as to justification, under Article 14. Those matters, unlike a determination as to ambit, relate more closely to the question of the detriment imposed on applicants by state arrangements with regard to formalisation of relationships.[97] Those decisions form part of a domestic line of case-law strongly influenced by the House of Lords' decision in *M* which, in narrowing the domestic ambit of Article 8(1), failed to engage with the core value of respect for dignity in the formal expression of family relationships under Article 8(1). It is now clear that the fact of being in a committed same or different-sex relationship is sufficient domestically to engage Article 8(1): the line of jurisprudence at Strasbourg discussed by Arden LJ is clear and constant as to the issue of engaging Article 8(1), and has *not* found that a specific interference by the state with the love, trust, confidence, or mutual dependence of a couple is necessary to create such engagement. So its ambit as understood domestically has now been realigned with its ambit as understood at Strasbourg, bar the problematic

[95] Ibid, at [63]-[68].
[96] The Court has emphasised that the important matter is the fair balance to be struck between the interest of the individual at stake, and the interest of the community as a whole. See *Hokkanen v Finland* (1995) 19 EHRR 139 at [55].
[97] Ibid, at [40].

distinction created between negative and positive obligations. That distinction does not, however, need to be maintained in the Supreme Court since it could simply overturn *M* on ambit.

(b) **Non-discrimination in according respect for family life**

Once the situation was found by Arden LJ to fall within the ambit of Article 8(1), Article 14 was also engaged. The applicants had to point to comparators in an analogous situation,[98] but the Court of Appeal assumed, without arguing the point, that the applicants were in a comparable situation to that of a same-sex couple[99] and that differential treatment had occurred since obviously such a couple in England and Wales could have accessed the civil partnership status. Arden LJ focused on the main issue, which was clearly that of justifying the differentiation between same and different-sex couples. Her dissenting judgment on this point reads like a leading judgment and made a number of significant points. She noted that if the differential treatment is on grounds of sexual orientation – then, following *Schalk* (and *Vallianatos*[100] with a range of other decisions, including *Karner v Austria*,[101] *Hämäläinen v Finland*),[102] weighty reasons would be needed to justify it, *unless* a wide margin of appreciation were to be granted because no consensus on the matter at issue was found to exist in Europe.[103] Andrews J had found that there was no European consensus on allowing different-sex partners to obtain formal recognition of their relationship by a means other than marriage,[104] and found therefore that weighty reasons would not be needed to justify the differentiation, concluding that even if Article 14 had been found to apply, it would not have been breached.

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[98] On the need to be in an analogous situation, see *Biao v Denmark* (Application no. 38590/10) decision of 24 May 2016; *Carson and Others v the United Kingdom* (2010) 51 EHRR 369 at [61] and *Burden v the United Kingdom* (2008) 47 EHRR 38 at [60].

[99] *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [74]. So did Andrews J at [57], on the hypothetical basis that Article 14 had been engaged.

[100] (2014) 59 EHRR 12 at [77].

[101] (2004) 38 EHRR 24 at [41].

[102] (2014) ECHR 787.

[103] *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [78]-[79].

[104] She accepted the argument that since only a very small number of states make registered partnerships and marriage available to both same-sex and different-sex couples, the UK had remained within its margin of appreciation in settling on the current arrangement while deciding on the future of civil partnerships: *Steinfeld & Keidan v Secretary of State for Education* [2016] EWHC 128, [2016] 4 WLR 41 at [69]-[70].

Arden LJ took a different view. She considered whether the decision of the Secretary of State to wait and see how same-sex marriage would impact on civil partnerships would fall within her discretionary area of judgment, as argued for on her behalf.[105] She accepted that the margin of appreciation argument would be irrelevant, given that the Court of Appeal is a domestic court, although she considered that the standard to be applied in considering justification would still be that of strict scrutiny, even if that argument had been applicable.[106] She found that the 'wait and see' decision did *not* fall within the discretionary area of judgment due to the importance of the prohibition of discrimination. Under strict scrutiny she found that the Secretary of State's 'wait and see' policy failed to strike a fair balance between the interests at stake, and also failed the test of proportionality.[107] She found that the policy was 'completely open-ended, thus giving the appellants no means of knowing when their state of uncertainty as to formalisation of their relationship might end'.[108] She also pointed out that the data sought by the Secretary of State as to formation of civil partnerships could only relate to same-sex couples, since only such couples could enter or dissolve them.[109]

Given that Arden LJ found no justification under Article 14, she went on to consider whether to make a declaration of incompatibility under section 4 HRA between the bar on different-sex couples entering a civil partnership and Article 8 read with 14. She decided not to do so, given that the Civil Partnership (Amendment) Bill 2015 was at the time before Parliament,[110] but instead to declare formally that the bar fell within the ambit of Article 8, and that the potential violation of the appellants' rights was not justified under Article 14 by the 'wait and see' policy.

Both Beatson LJ and Briggs LJ agreed with Arden LJ on the ambit of Article 8(1), but came to the conclusion that the 'wait and see policy' justified the potential discrimination under Article 14 on the basis that a change should not be made prematurely – by extending civil partnerships to different-sex couples, which might have to be reversed, wasting time and

[105] *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [93]-[94].
[106] Ibid, at [98].
[107] Ibid, at [110]-[127].
[108] Ibid, at [114].
[109] Ibid, at [115]-[116]. See A Hayward, 'Justifiable Discrimination – The Case of Opposite-Sex Civil Partnerships' (2017) 76 *Cambridge Law Journal* 243.
[110] Although it should be noted that as a Private Member's Bill, without Government support, it had little chance of making much progress in Parliament.

effort.[111] Beatson LJ, with whom Briggs LJ agreed,[112] found that the aim of the Secretary of State in taking time to form an assessment as to whether to extend partnerships to different-sex couples, or abolish them, was legitimate.[113] He found that different steps could be taken to eliminate the discrimination being suffered, and so resolution of the position was complex and would need time to resolve.[114] He did, however, consider that while the Court should not micro-manage areas of social policy, and therefore a deadline for eliminating the discrimination by taking one of the available options should not be set, there would come a point at which a court would not accept that the 'wait and see' policy remained justifiable. It is notable that these conclusions were *not* reached on the basis of conceding a discretionary area of judgment to the executive.

(c) **A stronger focus on equality in the Supreme Court?**

Steinfeld has moved on to the Supreme Court.[115] That court may be invited to take account of a case which – at a superficial glance – is similar to *Steinfeld* and was decided at Strasbourg after the Court of Appeal decision - *Ratzenböck and Seydl v Austria*.[116] It also concerned a different-sex couple in a stable, committed relationship who sought to access a registered partnership (the Austrian equivalent of a civil partnership) rather than marriage. Shortly after the introduction of registered partnerships in Austria in February 2010, intended to provide same-sex couples with a means of formalising their relationship, the couple sought unsuccessfully to register their relationship, considering that such partnerships offer a better reflection of their union and that 'marriage was not a suitable alternative for them'.[117] Their subsequent challenge under Articles 8, 12 and 14 ECHR failed domestically,[118] and they brought it to the Strasbourg Court.

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[111] Ibid, at [173].
[112] Ibid, at [174]-[175].
[113] Ibid, at [156].
[114] Ibid, at [157].
[115] On 8 August 2017 a panel of three Justices – Lady Hale, Lord Wilson and Lord Hughes – granted the Steinfeld litigants permission to appeal to the Supreme Court, with a hearing scheduled for 14-15 May 2018.
[116] Application no. 28475/12, judgment of 26 October 2017. See H Fenwick and A Hayward, 'Equal Civil Partnerships: Implications of Strasbourg's latest ruling for Steinfeld and Keidan' *UK Human Rights Blog*, 21 November 2017.
[117] Ibid, at [23].
[118] The Austrian Constitutional Court dismissed their claim, partly on the basis that they are not part of a vulnerable group. The Court also took account of a lack of consensus among the contracting states on the matter.

In a brief judgment the Court, by five to two, found no breach of Article 14 read with 8, on the basis that, since they could marry, the applicants were not in a relevantly similar or comparable situation to same-sex couples who had no right to marry in Austria and needed the registered partnership as an alternative means of providing legal recognition to their relationship. Thus the claim failed at the first hurdle under Article 14: since no comparator was found, the Court did not need to assess the difference of treatment or the justification for the difference. It is argued that this judgment can readily be found to be inapplicable to the situation in *Steinfeld*. The desire of both couples to enter a civil partnership is analogous but the positions they are in due to the forms of asymmetry of access to formalised relationship statuses in the two states are not. The point of fundamental importance for the litigation in *Steinfeld* is that, unlike the position in Austria, a different form of asymmetry of access in England and Wales is apparent. That would be a key distinguishing feature in the Supreme Court since it would not be possible to argue that no comparator is available since the couple in *Steinfeld* are obviously in the same position as that of a same-sex couple who wish to formalise their relationship but reject marriage as an effective option. The Court of Appeal in *Steinfeld* did not hesitate to find comparability under Article 14.[119] Interestingly, the Austrian Constitutional Court has since *Ratzenböck* provided – in effect – a model for the Supreme Court to consider: it has handed down a historic ruling creating complete symmetry of access to formal relationship statuses in Austria on the basis that the ban on same-sex marriage is discriminatory and registered partnerships should be opened to different-sex couples.[120] The decision will take effect in late 2018.[121]

The justification accepted by the majority in the Court of Appeal under Article 14 could well be rejected in the Supreme Court. As discussed, a measure creating differentiation between persons on grounds of sexual orientation can be justified if the measure taken is proportionate to the aim pursued. The government's argument, as indicated, and accepted by the majority in the Court of Appeal, was that the aim was to take time to consider the impact of the introduction of same-sex marriage on civil partnerships; it also argued that it needed time to consider ways of equalising state recognition of the relationships of same-sex and different-sex couples, and preferred to save the time that might be wasted if civil partnerships were

[119] See *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237 at [167]-[169] (Briggs LJ).
[120] See the Austrian Constitutional Court judgment: G 258/2017, 4 December 2017 with press release in English: https://www.vfgh.gv.at/medien/Ehe_fuer_gleichgeschlechtliche_Paare.en.php.
[121] These changes will occur on 31 December 2018 unless the legislature decides merely to repeal the Registered Partnership Act on the introduction of same-sex marriage.

made available to different-sex couples but then abolished. No timetable for the taking of the decision as to the future of civil partnerships was published. Assuming that that aim was accepted as legitimate, the measure taken to further it was to maintain the status quo – to avoid extending civil partnerships to different-sex couples for an unspecified period of time.

Following Arden LJ's argument, the measure taken to further that aim would require strict scrutiny, and under such scrutiny would have to be found to be weighty, given that it created differentiation on grounds of sexual orientation. In *Vallianatos* the demand for weighty reasons was found to mean that proportionality demands under Article 14 would not be satisfied if the measure chosen was merely suitable *in principle* to achieve the aim in question (in that instance protecting heterosexual unions outside marriage):[122] it also had to be shown to be necessary to achieve that aim to exclude same-sex couples from the category of registered partnerships. It was further found in *Taddeucci and McCall v Italy*[123] that that was particularly the case 'where rights falling within the scope of Article 8 are concerned'.

It is possible that, after the Supreme Court decision, a fairly substantial period of time may pass (in addition to the five years since 2013 when the differentiation arose) during which same-sex couples can access marriage or a civil partnership, but different-sex couples cannot access civil partnerships. During that period different-sex couples seeking relationship formalisation, but with beliefs precluding them from accessing marriage, would remain cohabitants, thereby experiencing detriment in terms of accessing certain benefits. That would mean that asymmetry of access had been maintained for a significant, indeterminate period of time, with legal consequences. Taking those points into account, was the measure chosen – to exclude different-sex couples from civil partnerships for an indefinite period of time – *necessary* to achieve the aims in question? The measure taken could possibly be found to be suitable for achieving the 'wait and see' aims but could not be said to be 'necessary' to achieve them. Its necessity could be found to be established in respect of avoidance of the introduction of different-sex civil partnerships only to abolish them later, but the necessity of concomitantly demanding an indeterminate amount of time before making a decision as to abolition is not apparent, as Arden LJ pointed out.[124]

[122] *Vallianatos v Greece* (2014) 59 EHRR 12, at [85].
[123] Application no. 51362/09, judgment of 30 June 2016, at [89].
[124] *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81, [2017] 3 WLR 1237, at [111]-[114]. It may be noted that Italy's somewhat similar 'wait and see' argument ('time was necessarily required to

Further, the suitability of the measure taken could be doubted since, as discussed below, a decision to abolish civil partnerships could be susceptible to a challenge under Article 8 read alone or with Article 14 ECHR under the HRA, brought by existing civil partners. Moreover, a possible underlying basis for the indeterminate length of time the government asserted that it needed to consider the future of civil partnerships, and the need therefore to take the measure of maintaining asymmetry of access for that period, may have been the desire to encourage different-sex couples to access the more established (and until *Walker*, in one respect, more privileged) relationship status – marriage – while leaving the less established status – civil partnership - to be populated by the proportion of same-sex couples for whom marriage is not an effective option. In principle, the aim put forward by a government under Article 14, or the measures taken to realise it, should not themselves be tainted by covert discrimination against a protected group – in this instance same-sex couples.

It is argued therefore that weighty reasons were not available to justify the differentiation under Article 14, so the difference of treatment could be found to be discriminatory. On that basis, in a move which would outpace Strasbourg on this matter,[125] a breach of Article 8 read with 14 could be found in the Supreme Court. If so, the Court might consider deploying section 3 HRA to seek to reinterpret the relevant provisions of the Civil Partnership Act 2004 to enable it to cover different-sex couples. In textual terms the change would be fairly minimal since the Act does not prefix 'civil partner' with the words 'same-sex': it would merely involve disapplying the words 'of the same sex' in sections 1(1) and 3(1)(a) of the Act, as the Loughton Bill was originally intended to do.[126] To do so could be viewed as opposing the main purpose of the statute which was to provide protection specifically for same-sex couples. But while that was the intention in 2004, the context within which the Supreme Court will decide *Steinfeld* has significantly changed since then, partly due to the introduction of same-sex marriage. An analogy could be drawn with the decision in *Ghaidan*

achieve a gradual maturation of a common view') was not accepted in the context of finding a breach of Article 8 in *Oliari and others v Italy* (2015) 65 EHRR 957 at [176].

[125] See the comments of Lord Wilson on the matter of such outpacing in the minority in the Supreme Court in *Moohan v Lord Advocate* [2014] UKSC 67, [2015] AC 901 at [105]-[106].

[126] See the Civil Partnerships, Marriages and Deaths (Registration Etc.) Bill 2017-19 prior to Government amendments imposed at the Second Reading stage. Also note that on 13 July 2017 Baroness Burt introduced into the House of Lords the Civil Partnership Act 2004 (Amendment) (Mixed Sex Couples) Bill 2017-2019 adopting the same minor textual amendment approach but going further by amending sections 86 and 138 relating to eligibility in Scotland and Northern Ireland respectively.

v Godin-Mendoza[127] to the effect that section 3 HRA could be deployed to read the Rent Act 1977 to cover same-sex couples.[128] Obviously that was not the intention in 1977, but could be said in 2004, when *Ghaidan* was decided, not to oppose the grain of the statute in the changed social context at that time. However, the Supreme Court might well be reluctant on policy grounds to reshape sections 1 and 3 of the Civil Partnership Act to include different-sex couples. The Loughton Bill in its original iteration was opposed by the government on a range of policy grounds: it would, it was argued, have necessitated changes to other statutes and given rise to private international law problems.[129] Such issues would obviously also arise if the Supreme Court made the change in question.

Instead the Court would probably be prepared to make a declaration of the incompatibility between Articles 8 and 14 and sections 1 and 3(1)(a) Civil Partnership Act 2004, although a finding of incompatibility does not make a declaration inevitable.[130] A partial analogy could be drawn with *Bellinger v Bellinger* in which the government had already announced its intention to introduce comprehensive primary legislation relating to the implications of the Matrimonial Causes Act 1973 section 11(c) when the declaration as to its incompatibility with Article 8 was made in the House of Lords.[131] Such a declaration in *Steinfeld* in the Supreme Court would be likely to have an influence on the review of the 2004 Act that the government has stated is currently under way, and which may now be more far-reaching if the Loughton Bill passes into law.[132] Amendment to the 2004 Act, opening civil partnerships to different-sex couples, would provide one possible answer to the declaration. One possible result could be, therefore, that the reforms to access to formal relationship statuses discussed in Part 1, premised on creating equality between same and different-sex couples, could be brought to fulfilment: the Supreme Court could prompt full achievement of non-

[127] [2004] UKHL 30, [2004] 2 AC 557.
[128] Here the House of Lords used s 3 HRA to construe 'as his or her wife or husband' in Sch 1, para 2 of the Rent Act 1977 to mean 'as if they were his or her wife or husband', enabling same-sex couples access to the same right to succeed a tenancy upon the death of a partner as enjoyed by different-sex couples.
[129] See the policy objections raised by government representative Robert Halfon MP during the Second Reading of Tim Loughton's Civil Partnership Act 2004 (Amendment) Bill 2016-17 focusing on 'the legislative complexity introduced by a change to the law alongside the difficulty in estimating the size of the challenge in successfully making such a change': *Hansard*, HC Deb, vol 619, col 650 (13 January 2017).
[130] See *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657.
[131] [2003] UKHL 21, [2003] 2 AC 467 at [37], [55].
[132] Note that the Government has stated in the Second Reading of the Loughton Bill that work on the review of civil partnerships will be 'commenced immediately'; that was regardless of whether the House permitted the Bill to have its Second Reading: *Hansard*, HC Deb, vol 635, col 1121 (2 February 2018). Of course, placing that commitment on a statutory footing, as the Loughton Bill intends, adds greater transparency to the review process and strengthens the obligation to reach a conclusion on this matter.

discrimination in terms of access to such statuses. But abolition of civil partnerships would also provide a response to a declaration of the incompatibility.

3. THE DETRIMENTAL IMPACTS ON SAME-SEX COUPLES OF ABOLITION OF CIVIL PARTNERSHIPS

A number of contracting states abolished registered partnerships when same-sex marriage was introduced, but England, Wales and Scotland are in the unique position of maintaining them for a significant period of time *after* the introduction of same-sex marriage, thereby giving rise to the expectation, especially after 2013, that entering one means entering a stable, established, enduring relationship status. It is notable that when it is known or anticipated that same-sex marriage is soon to be introduced, and may be accompanied by the abolition of civil (registered) partnerships in a state,[133] there is often a significant drop in the take-up of such partnerships. That appears to be attributable in part to the reluctance of couples to enter a formal relationship status that may soon be abolished,[134] precisely because couples do not want to find themselves in a 'legacy' relationship. That occurred very strikingly in England and Wales prior to the passing of the 2013 Act since couples would not necessarily have been aware that civil partnerships were not to be abolished.[135] But when it became apparent that abolition was not intended, take-up of civil partnerships stabilised and then rose slightly.[136]

There are a range of possible models, as discussed further below, for addressing the future of civil partnerships other than opening them up universally to all couples.[137] These models range from, firstly, leaving such partnerships open only to same-sex couples, to, secondly, closing them to new entrants but maintaining the existing partnerships, and, thirdly, to abolishing them and ending the system entirely. Obviously the first option is the one that will

[133] On this decrease in registrations prior to the introduction of same-sex marriage, see B Tobin, 'Registered Partnerships in the Republic of Ireland' in JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017) 285.
[134] See B Sloan, 'Registered Partnerships in Northern Ireland' in JM Scherpe and A Hayward, ibid, 262, questioning whether the decrease in registrations in 2015 'can be explained by anticipation of the introduction of same-sex marriage' which is yet to be introduced in Northern Ireland.
[135] See A Hayward, 'Registered Partnerships in England and Wales' in JM Scherpe and A Hayward, ibid, 201, noting that there were 5,646 registrations in 2013 and 1683 in 2014, the year that same-sex marriage was introduced.
[136] See Office for National Statistics, 'Civil Partnerships in England and Wales: 2016', 26 September 2017.
[137] These models are analysed in A Hayward, 'The Future of Civil Partnership in England and Wales' in JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017).

be addressed by the Supreme Court, as discussed, on the basis that it creates formal status discrimination.

(a) **Same-sex couples ideologically opposed to marriage**

The second option of abolishing civil partnerships completely for new entrants was mentioned in *Steinfeld* and, after an inconclusive consultation in 2014, is currently under review; the government considers that sufficient data on which to base a decision will be available by September 2019.[138] If introduced it would mean that same and different-sex couples would each have access to one formalised relationship status only - marriage. Thus, as between same and different-sex couples, the asymmetry of access found by Arden LJ to create a breach of Article 14 read with 8 would disappear. However, retaining civil partnerships and opening them to all couples instead would benefit same-sex couples: all the points made above as to the detrimental impact on different-sex couples ideologically opposed to marriage of the lack of ability to access the civil partnership status would also apply due to abolition to same-sex couples who are also so opposed,[139] and it is argued that the detrimental impact could be greater. The position would be that some same and different-sex couples would continue to seek state formalisation and recognition of their relationship with the civic benefits thereby accruing, but a number of them would reject the marriage status as non-reflective of their relationship due to its lingering patriarchal associations.[140] But some same-sex couples might also view it more strongly than would some heterosexual couples as an institution reflective of heteronormativity and heterosexual mores.[141] So if abolition occurred some same-sex couples would be denied state formalisation of their relationship on the basis of a *more* deeply rooted ideological objection to marriage. While this argument might find recognition under Article 8 in relation to *existing* civil partners, as discussed below, it could, under non-legalistic dignity-based arguments aid in persuading the

[138] See Part 1 above on the current status of the Loughton Bill.
[139] See C Stychin, 'Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004' (2006) 14 Fem LS 79 and L Lea, '"I don't": Why Choose Civil Partnership Over Marriage?' *BBC News* 2 November 2016.
[140] It is not argued that all same or different-sex couples who reject marriage but seek to enter a formalised relationship status are attracted to civil partnerships due to the patriarchal or heteronormative associations of marriage: see A Barlow and J Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' [2010] CFLQ 328. See also A Jowett and E Peel, '"A Question of Equality and Choice": Same-Sex Couples' Attitudes towards Civil Partnership after the Introduction of Same-Sex Marriage' (2017) 8 *Psychology and Sexuality* 69.
[141] See K McK Norrie, 'Marriage is for Heterosexuals – May the Rest of Us be Saved from It' [2000] CFLQ 363.

government to choose the option of opening civil partnerships to different-sex couples rather than abolishing them.

The evidence is that a significant proportion of same-sex civil partners do not seek to marry since they have not taken the option, available to them since 2013, of conversion of their civil partnership to marriage.[142] Further, whilst there was a decrease in civil partnership registrations immediately preceding and following the introduction of same-sex marriage,[143] 2016 saw the first annual increase since the introduction of same-sex marriage (3.4 per cent compared with 2015).[144] This pattern is especially true of older same-sex couples[145] which is perhaps attributable to the fact that their longer experience of legalised homophobia has created from their perspective an association between marriage and contempt for same-sex relations they find harder to overcome than do younger same-sex couples.

It has also been pointed out by the Church of England in response to the Consultation that some Christian and other same-sex couples hold the traditional understanding of marriage as being between a man and a woman, and therefore will not contract marriage; so retention of civil partnerships would still provide such couples with a social and legal framework within which their relationship 'can be honoured and recognised'.[146]

(b) Existing civil partnerships

Abolition for new entrants (the second option) would have an adverse impact on same-sex couples already in a civil partnership since their relationship status would then appear to have a diminished validity. Assuming that a number of couples maintained their civil partnerships, they would become part of a steadily diminishing and, it is argued, ghettoised, group in a

[142] See J Haskey, 'Civil Partnerships and same-sex marriages in England and Wales: A Social and Demographic Perspective' (2016) Fam Law 44, noting that only 1 in 8 civil partnerships have been converted to marriages and the observation of Tim Loughton MP in the Second Reading of his Bill, discussed above, that 'more than 80% of same-sex couples who have committed to a civil partnership do not think that they need to or want to convert that into a marriage': *Hansard*, HC Deb, vol 635, col 1142 (2 February 2018).
[143] See Office of National Statistics, *Marriages in England and Wales in 2015: Statistical Bulletin,* 28 February 2018.
[144] See Office of National Statistics, *Civil Partnerships in England and Wales in 2016: Statistical Bulletin*, 26 September 2017.
[145] Nearly half (49%) of all individuals forming civil partnerships in 2016 were aged 50 and over. See a similar observation made in *Steinfeld* by Arden LJ at [121] who noted that 'numbers for this group are clearly not insignificant'.
[146] See Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London, 2014) para 2.5.

'legacy' relationship.[147] In the Second Reading of his Bill in 2018, Tim Loughton MP considered that the move would create 'tens of thousands of civil partners in limbo, forced either to become an abolished species or to convert to the full marriage that they had thus far resisted'.[148] Echoing the theme of equality present within this area of law, Sandy Martin MP argued that such a move would create a 'separate but different' relationship that fundamentally undermined the 'basic principle that people should be treated the same in law'.[149] All legislation passed in future affecting married couples would, until the last civil partners died, have to make special provision for that group. Some civil partners would, for those reasons, decide to convert to marriage, but there would be an element of state coercion to do so involved if they would not have chosen conversion otherwise – and, as mentioned above, it appears that a number of them would not have done so.[150] Whilst the mere presence of civil partnerships has been seen as undermining the institution of marriage, it is also arguable that restricting choice and in effect coercing couples into marriage in order to access legal protections can equally be viewed as undermining that institution.

The further possibility of *forced* conversion to marriage, or forced dissolution, if civil partnerships are abolished (the third option) has been floated by the Department for Culture, Media and Sport in the consultation mentioned above.[151] Responding to the consultation, the Church in Wales found: 'it would be particularly unkind to do away with civil partnership retrospectively, forcing those who have already contracted them to either dissolve them or convert them into marriage.' The TUC commented: '...abolition would make it compulsory either for existing Civil Partners to get married or to separate and this would be a brutal enforced change of their preferred status…'.[152] That possibility has led to consideration of creating some form of statutory dissolution in order to reflect the fact that the state is inflicting the change on civil partners who do not seek to marry, so those couples should be accorded an alternative way of ending their relationship, as opposed to dissolution in the

[147] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): A Consultation*, London, 2014, para 3.10, noting '[u]p to 50,000 UK couples could be left in a legacy relationship which would increasingly become a legal relic and which the State would have to continue to administer'.
[148] *Hansard*, HC Deb, vol 635, col 1104 (2 February 2018). Similar observations were made by Andy Slaughter MP who stated that abolition would be 'perverse' and would create 'a historical and fossilised group of people'. *Hansard*, HC Deb, vol 635, col 1132 (2 February 2018).
[149] Ibid, col 1126.
[150] Couples were incentivised in 2014 to convert their civil partnerships through a waiver of the associated administrative fees in the first year of same-sex marriage coming into force.
[151] See Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): A Consultation*, (London, 2014) paras 3.2-3.8.
[152] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London, 2014) para 2.8.

usual sense, since it is linked to the breakdown of relationships.[153] Ultimately, the prospect of abolishing civil partnerships for same-sex couples is likely to be met with considerable resistance; activist Peter Tatchell has stated that it would 'provoke an almighty backlash' and 'do catastrophic damage to relations between the Conservative party and LGBT people'.[154]

(c) Challenging a decision to abolish civil partnerships under the HRA

A challenge could be brought, for example, by an LGBT activist group partly made up of and representing current civil partners. It is possible that the second and third options are inconsistent with the demands of Article 8, or of that Article read with Article 14, under the HRA, but they may be consistent with those demands within the scope of this area of jurisprudence as currently understood at *Strasbourg* since all that appears to be required at present is that a legal framework is available to accord a couple's relationship formal recognition.[155] It is argued, however, that a challenge under Article 8 read with 14 to abolition as direct discrimination on grounds of sexual orientation would probably fail since it would be hard to identify comparators given that all couples would have available to them one formalised relationship status – marriage, thus demonstrating the limitations of relying on the equality argument alone.

Adopting the third option would mean that existing civil partners would experience detriment linked to sexual orientation since, if they had already determined that marriage was a non-effective option for them, they would be *forced* to relinquish a previously recognised relationship form available only to same-sex couples;[156] no effective formalisation of their relationships would be available. Adoption of the second option would mean that, as mentioned above, civil partners would tend to view themselves as inhabiting a relationship status with diminished credibility. Indirect discrimination is recognised under Article 14,[157] and, following the Court of Appeal decision in *Steinfeld,* Article 8 would clearly be engaged.

[153] Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): A Consultation*, (London, 2014) para 3.5.
[154] Equal Civil Partnerships Campaign, 'Campaign responds to reports of Government u-turn on civil partnerships for opposite-sex couples', 1 February 2018.
[155] See *Orlandi and others v Italy* no. 40183/07, judgment of 9 June 2016, at [210].
[156] On the problems generated by this approach see Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London, 2014) para 2.8, para 2.29.
[157] See: *DH v Czech Republic* (2006) 43 EHRR 923; *Horvath and Kiss v Hungary* No. 11146/11, judgment of 6 February 2013.

Abolition of civil partnerships as an apparently neutral measure would in practice have some adverse impact on those in existing partnerships, who by definition would be same-sex couples. (Formally speaking, according to the Civil Partnership Act 2004, civil partnerships are available to any couple of the same sex, so they are based on gender, not sexuality, but *de facto* abolition of civil partnerships would have an adverse impact on homosexuals rather than heterosexuals.) No similar case has arisen at Strasbourg: it would have to be demonstrated that the couples in existing civil partnerships had suffered adverse impact to support an indirect discrimination claim. That would be fairly straightforward under the third option,[158] but more difficult under the second, since no civic benefits would be lost; the detriment would flow only from the perception that the validity of the relationship status had been undermined.

In relation to either option arguments could also be put forward under Article 8 read alone. In that case, a court would have to begin by finding that the situation fell within the ambit of Article 8, relying on the values of dignity and autonomy.[159] The situation could be found to fall within its ambit on the basis that the state had breached a negative obligation – to avoid interference with an existing relationship status. If it was considered (as found in *M* and acknowledged in *Steinfeld*) that detriment should therefore be shown, that requirement would appear to be readily satisfied in relation to the third option for the reasons already discussed, given the serious interference with private and family life that a forced relinquishing of a civil partnership, or its dissolution, would represent. That course would create a far greater disturbance of family life, showing a greater disrespect for the family life of existing civil partners than would opening civil partnerships instead to different-sex couples. Under Article 8(2) the interference could be found to be unjustified on the basis of fair balance since no strong countervailing public interest can be identified;[160] further, adopting the second option would have created a more minimal invasion of the right; therefore the demands of proportionality would not be likely to be found to be satisfied. A court would be free under s 2 HRA to find a breach of Article 8 since no clear, contrary decision at Strasbourg covers this

[158] See Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London, 2014) para 2.29.
[159] See D Feldman, 'Human dignity as a legal value: Part 2' (2000) PL 61, 74 (in a different context): 'when one allies the interest in dignity with that in autonomy on classic, liberal principles, the right of people to make choices about their lifestyles (including their sexual activities), and to identify their notions of the good life for themselves, is of central importance'.
[160] See *Oliari and others v Italy* (2015) 65 EHRR 957 at [160].

point:[161] Strasbourg has not had to consider the question of maintenance of registered partnerships followed by later forced conversion to marriage or forced dissolution once same-sex marriage was introduced in a state.[162] So if the third option was taken, which may be unlikely, a breach of Article 8 might well be found.[163] (If civil partnerships were extended to different-sex couples, but *then* abolition was contemplated, the simple option of maintaining instead the partnership status for same and different-sex couples, as in the Netherlands, would also create a more minimal invasion.)

But in relation to the second option a domestic court would probably be less likely to find a breach. The margin of appreciation doctrine is inapplicable in domestic courts, as pointed out in *Steinfeld*, but the legislation enabling abolition might be found to fall within the discretionary area of judgment accorded to Parliament/the executive, a notion that is fairly well established in post-HRA judicial reasoning.[164] It may be said that domestic jurisprudence has evolved post-*Nicklinson*[165] in that arguably some encouragement has been given to the judiciary to respecting that area when applying the ECHR in respect of particularly contentious matters that would fall within the margin of appreciation that the state would be allowed at Strasbourg. The notion of a discretionary area of judgment has been utilised in the domestic courts in recent years to avoid finding a violation of the ECHR where the view is taken that the issue should be dealt with by Parliament, especially in areas of contentious social policy.[166]

It might appear that the future of civil partnerships is precisely the type of issue which would invite the use of this area of discretionary judgment to preserve the right of Parliament to

[161] In the transsexual case of *Hämäläinen v Finland* (2014) ECHR 787 coerced conversion of a marriage to a registered partnership (after the transition of one member of the married couple had meant that the marriage became same-sex) was not found to create a breach of Articles 8 or 12, but that was on the basis that states were not under an obligation to introduce same-sex marriage.
[162] On reform patterns, see JM Scherpe, 'The Past, Present and Future of Registered Partnerships' in JM Scherpe and A Hayward, *The Future of Registered Partnerships – Family Recognition beyond Marriage?* (Intersentia, 2017) 561, 576.
[163] Stonewall acknowledged that the Government could face costs due to legal challenges by individuals who had their civil partnerships converted to marriage: Department for Culture, Media and Sport, *Civil Partnership Review (England and Wales): Report on Conclusions* (London, 2014) para 2.29.
[164] See D Pannick, 'Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgement' (1998) PL 545, 549-551 and J Jowell and Lord Steyn, 'Deference: a tangled story' (2005) PL 346.
[165] See *R (on the application of Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, in particular at [73] and [296].
[166] See eg the doctrine's use in relation to Northern Irish abortion law in *A-G for Northern Ireland v NIHRC* [2017] NICA 42.

choose the path it views as most appropriate, especially as Strasbourg has accepted that where one formalised relationship status is available to a couple, the state will be within its margin of appreciation in determining that it need not make a different status available.[167] While acceptance of that area was not expressly referenced by the Court of Appeal in *Steinfeld*, it could be said to accord with the general thrust of the judgment since there was a willingness of all three judges, including Arden LJ, to allow Parliament to take any one of the available options as to the future of civil partnerships; the problem for Arden LJ simply lay in the indeterminate delay involved in the 'wait and see' policy. Those points were made in the context of Article 14, but where discriminatory treatment was not involved significance would be more likely to be placed on according a discretionary area of judgment to the legislature, albeit, it is argued, not one covering the more serious invasion of family life represented by the third option.

CONCLUSIONS

Clearly, furtherance of equality between same and different-sex couples relates to the expression of a fundamental human rights value.[168] This article has traced movement towards the creation of equality due to the introduction of same-sex civil partnerships and marriage. The search for the 'perfection' of equality as linked to access to formal relationship statuses was furthered by the Supreme Court in *Walker* but only contemplated by the majority in the Court of Appeal in *Steinfeld*. So this article has made a case – which the Supreme Court may accept - for broadening the conception of non-discrimination in relation to respect for family life by encompassing a greater value to be placed on creating symmetry of access to recognised formal expressions of relationships under Article 14 than was recognised by the majority in *Steinfeld*. Once weight is ascribed to according such symmetry, the imprecisely formulated justification accepted in *Steinfeld* for withholding it for a significant period comes under a pressure which, it has been argued, it is unable to withstand.

This article concludes by reaffirming that 'perfecting' equality in the sense argued for here means creating symmetry of access to formalisation of relationships as between same and

[167] *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at [101]. See also *Orlandi and others v Italy* no. 40183/07, judgment of 9 June 2016.
[168] See N Bamforth, 'Same-Sex Partnerships and Arguments of Justice' in R Wintemute and M Andenaes, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart Publishing, 2001).

different-sex couples by opening civil partnerships to different-sex couples in England and Wales. But it also concludes that the limitations of the direct discrimination argument under Article 14 are revealed by the threat of abolition of the civil partnership status since same and different-sex couples would be placed in the same position, although some same-sex couples would be more detrimentally affected in terms of a state assault on their access to a relationship status of particular meaning to them. As discussed, the detriment suffered by existing civil partners due to abolition could be addressed by deploying arguments under Article 8 linking dignity and equal treatment. The limitations of relying on the equality rationale alone to drive the introduction of civil partnerships, and same-sex marriage require acknowledgement, since achieving equality of access to formal relationship statuses could be achieved at the expense of disregarding the value of civil partnerships. That point should not be disregarded by the government response if the key principle established by the Supreme Court in *Steinfeld* in terms of 'perfecting' equality is that disallowing access to a particular formal relationship status on the basis of sexual orientation amounts to discrimination under Article 14.